89- 1469

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

DRY LAND MARINA, INC.,
Petitioner,

vs.

PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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QUESTIONS PRESENTED

I. DID THE TRIAL COURT UNCONSTITUTIONALLY PLACE PETITIONER IN DOUBLE JEOPARDY BY REPLACING A REGULAR JUROR WITH A PREVIOUSLY DISCHARGED ALTERNATE JUROR AFTER JURY DELIBERATIONS HAD ALREADY BEGUN AND WITHOUT MANIFEST NECESSITY?

II. DID THE TRIAL COURT UNCONSTITUTIONALLY DEPRIVE PETITIONER OF TRIAL BY A FAIR AND IMPARTIAL JURY BY ENTERING JUDGMENT AGAINST PETITIONER ON THE VERDICT OF THE RECONSTITUTED JURY EVEN AFTER DISCOVERING THAT ONE OF ITS MEMBERS HAD, CONTRARY TO HER DENIALS IN OPEN COURT, DISCUSSED THE CASE WITH AN ASSISTANT KENT COUNTY PROSECUTING ATTORNEY BEFORE HER INSTALLATION ON THE RECONSTITUTED JURY?

LIST OF PARTIES AND AFFILIATES

The parties in the proceedings below included the Respondent People of the State of Michigan and the Petitioner Dry Land Marina, Inc. In addition, the following individuals were parties in the trial court: James E. Geerlings; Herbert F. Postma, Jr.; Randy F. Postma; and Marc Vanden Bosch. These individuals were acquitted in the trial court and have no interest in this proceeding.

The only parties to this proceeding are the Petitioner Dry Land Marina, Inc., and the Respondent People of the State of Michigan.

Dry Land Marina, Inc., has no parent company and no subsidiaries.

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The opinion of the Michigan Court of Appeals is reported at 175 Mich. App. 322; 437 N.W.2d 391, and is reprinted in the Appendix to this Petition beginning at Page A1. The order of the Michigan Supreme Court denying leave to appeal is noted at 433 Mich. 914, and is fully reprinted in the Appendix to this Petition beginning at page A9.

The opinion of the Honorable George R. Cook, the late judge of the Circuit Court of Kent County, Michigan, was delivered orally and transcribed by an official court reporter, but not published. The transcribed bench opinion is reprinted in the Appendix to this Petition beginning at page A10.

JURISDICTION

On December 19, 1989, the Supreme Court of the State of Michigan issued its order denying the Petition of Dry Land Marina, Inc., for leave to appeal. This order left the February 23, 1989, decision of the Court of Appeals of the State of Michigan as the final judgment rendered by the highest court of a state in which a decision could be had. Accordingly, Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1257, 2101(d), and S. Ct. R. 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

> No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . .

U.S. Const. amend. V.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

U.S. Const. amend. VI.

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

The State of Michigan charged Petitioner with eight counts of filing fraudulent sales tax returns, and charged four of Petitioner's officers and salespersons with aiding and abetting the alleged corporate violations. Each count addressed a monthly sales tax return filed by Petitioner between 1980 and 1983. The State alleged that during each of the eight months one or two boat sales occurred on which Petitioner had failed to report and remit sales tax supposedly due. Petitioner had reported each of the sales as exempt from tax as a "sale for resale" or a sale "in interstate commerce." The State did not charge Petitioner with diverting moneys collected for sales tax or with failing to report the sales as exempt transactions.

Trial began on September 15, 1986, with the selection of 14 jurors. After 12 days of testimony, the trial court selected two jurors by lot and discharged them from the jury under Michigan Court Rules governing selection of alternate jurors in criminal cases. M.C.R. 6.102(A). The alternates left the jury room and the jury began its deliberations at about 3 p.m. on October 7, 1986.

The following day, the jury continued its deliberations. During the day's deliberations, one of the jurors, Ms. Koewers, informed the court that her arm hurt and that she was not feeling well. (Contrary to the statement of the Michigan Court of

Appeals, nothing in the record suggests that Ms. Koewers' arm was broken.) She asked the court's clerk whether an alternate juror could take her place. At about 2:30 p.m., the court excused the jury for the day and instructed Ms. Koewers to return the following morning or inform the court of her status.

The next day, Ms. Koewers failed to call or appear, but the court's clerk advised that, on her way to work, she had seen Ms. Koewers seated outside the office of the Kent County Friend of the Court on another floor of the courthouse. Ms. Koewers was there to appear in another court with a friend whom she had bailed out of jail the previous evening.

The trial judge summoned Ms. Koewers to his chambers at 9:10 a.m. and questioned her. Ms. Koewers told the trial judge that her arm still hurt and that she planned to see her doctor at 11:30 a.m. Although Ms. Koewers was obviously well enough to bail a friend out of jail and to appear with the friend in another court, the trial judge asked Ms. Koewers directly whether she could continue deliberations in this case. Ms. Koewers said she "probably" could after she met with her doctor. Rather than wait the short time it would have taken to obtain a doctor's opinion, the court summarily dismissed Ms. Koewers from the jury and informed counsel that the court intended to reconstitute the already-deliberating jury with one of the previously discharged alternate jurors.

Even before questioning Ms. Koewers in chambers, the trial judge had summoned the previously discharged alternate jurors to the courtroom. At 9:22 a.m., the court perfunctorily questioned former jurors Harrell and Beardsley in open court. The court asked Ms. Harrell directly if she had discussed the case with anyone. Ms. Harrell answered unequivocally: "No." The court

proceeded over the objection of Petitioner's counsel to select Ms. Harrell by lot as a replacement juror. After the selection process and the court's instruction to begin deliberations anew, the reconstituted jury resumed deliberations.

Shortly after the new jury resumed deliberations, the court learned that Ms. Harrell had, contrary to her denial, discussed the case after her discharge with an Assistant Kent County Prosecutor, Ms. Mullendore. The trial judge placed Ms. Mullendore under oath and questioned her about the conversation. Ms. Mullendore reported that Ms. Harrell told her she was disappointed about her selection as an alternate, and that she appreciated the opportunity to discuss the matter privately with the trial judge. The Assistant Prosecutor asked Ms. Harrell what her verdict would have been, and Ms. Harrell said "that she would have voted not guilty." The Assistant Prosecutor responded briefly, but did not reveal the substance of the response in court. According to the Assistant Prosecutor, Ms. Harrell further stated that she "just didn't feel the evidence was there" and that she felt "very strongly about it." Over Petitioner's continued objection, the court permitted the new jury to proceed with deliberations.

On October 13, 1986, the new jury returned its verdict. The new jury acquitted all individual defendants on all counts. The new jury acquitted Petitioner on two counts and convicted on five counts. (The court had dismissed the one remaining count at the close of the prosecution's case.) On January 29, 1987, the court sentenced Petitioner to pay the maximum allowable fine of $5,000 per count, for a total of $25,000, plus court costs of $10,000.

Petitioner preserved the constitutional questions presented in this Petition by raising them before the trial court. Petitioner initially objected to the court's dismissal of Ms. Koewers and

substitution of Ms. Harrell after jury deliberations had already begun as a violation of the constitutional right to a fair trial:

> THE COURT: I take it you would like to put your objections on the record.
>
> MR. SAWYER [Petitioner's Counsel]: Yes, Your Honor. We object to the entire proceeding. We feel it violates our right to a fair jury trial under the Sixth Amendment of the United States Constitution . . . .

(Transcript of Trial Proceedings, October 9, 1986, at 3.) After trial, Petitioner renewed and elaborated its constitutional objections to the procedure by requesting dismissal of all charges based on Petitioner's constitutional right not to be placed in double jeopardy:

> MR. VANDER ARK [Petitioner's Counsel]: . . . Your Honor, the result we are asking for in our . . . motion is to dismiss. The reason we ask this Court to flat-out dismiss these charges is our position that there was not manifest necessity to discharge this juror . . . that double jeopardy has attached.

(Transcript of Motions, December 9, 1986, at 20.) The trial court rejected both claims.

During the appellate process, Petitioner again preserved the constitutional issues. On appeal to the Michigan Court of Appeals, Petitioner raised the constitutional objections presented by this Petition and, like the trial court, the Court of Appeals rejected them. *People v. Dry Land Marina*, 175 Mich. App. 322, 325-27; 437 N.W.2d 391, 392-393 (1989). In its Application for Leave to Appeal to the Michigan Supreme Court, Petitioner once again raised the constitutional issues presented

by this Petition. (Brief in Support of Application of Defendant-Appellant Dry Land Marina, Inc. for Leave to Appeal, March 13, 1989, at 10 (relying on "Dry Land's constitutional right to a fair trial by the original jury" and on "the constitutional right to proceed 'with the jury as drawn,' absent consent or a finding of manifest necessity").) The Michigan Supreme Court denied leave to appeal and, accordingly, did not address the merits of the questions.

Petitioner now seeks relief from this Court.

REASONS FOR GRANTING THE WRIT

I. BY RECONSTITUTING THE JURY WITHOUT MANIFEST NECESSITY AFTER DELIBERATIONS HAD BEGUN, THE TRIAL COURT UNCONSTITUTIONALLY SUBJECTED PETITIONER TO DOUBLE JEOPARDY.

A criminal defendant may not constitutionally be placed in jeopardy more than once for the same offense. U.S. Const. amend. V, XIV; *Benton v. Maryland,* 395 U.S. 784 (1969). Jeopardy attaches once a jury is impaneled and sworn. *Serfass v. United States,* 420 U.S. 377, 388 (1975). As soon as jeopardy attaches, a criminal defendant has the constitutional right to have that jury weigh his guilt once and for all. *United States v. Jorn,* 400 U.S. 470, 484 (1971) (a criminal defendant has a "valued right to have his trial completed by a particular tribunal") (*quoting Wade v. Hunter*, 336 U.S. 684, 689 (1949)). Only one thing may override this valued right: namely, a finding that "manifest necessity" requires discharge of a particular jury. *Jorn,* 400 U.S. at 485; *United States v. Perez*, 9 Wheat. 579 (1824). In such a case, a

court may discharge the original jury and submit the matter to a new jury without violating the constitutional prohibition of double jeopardy.

In this case, the trial court unconstitutionally placed Petitioner in double jeopardy by, without manifest necessity, submitting the question of Petitioner's guilt to a jury other than the original jury sworn to decide the question. If the trial court had summarily dismissed all twelve jurors, rather than only Ms. Koewers, even the prosecution would have had to concede the point. But because this case involves the summary dismissal of only one juror, and the substitution of a previously dismissed alternate juror, the prosecution argued, and the Michigan Court of Appeals held, that the double jeopardy prohibition did not apply. Petitioner respectfully submits that what both the prosecution and the Michigan Court of Appeals overlooked is the critical--indeed, the constitutional--line crossed by the use of alternate jurors after deliberations have already begun.

Both state and federal courts have recognized the constitutional significance of this line. *See United States v. Hayutin,* 398 F.2d 944, 950 (1950) (2d Cir.) (use of alternate jurors after deliberations commence exposes defendant to the risk "of being placed in double jeopardy by being tried by more than one jury"), *cert. denied sub nom. Nash v. United States*, 393 U.S. 961 (1968); *United States v. Baccari,* 489 F.2d 274, 275 (10th Cir. 1973) (substitution of alternate juror after deliberations had begun implicated "constitutional jury rights" that defendant validly waived), *cert. denied* 417 U.S. 914 (1974); *People v. Ryan*, 19 N.Y.2d 100, 104-105; 278 N.Y.S.2d 199, 203 (1966) ("[O]nce the deliberative process has begun, it should not be disturbed by the substitution of one or more jurors who had not taken part in the previous deliberations and who had cease[d] to function as jurors . . .").

Even this Court has questioned the constitutionality of post-deliberation substitution of jurors. Orfield, *Trial Jurors in Federal Criminal Cases,* 29 F.R.D. 43, 46 (1962). *See also Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure*, 97 F.R.D. 245, 300-01 (1982). Because of the constitutional significance of the beginning of juror deliberations, no court should reconstitute a deliberating jury without manifest necessity.

What makes this case particularly ripe for certiorari is another line of decisions that appear to uphold post-deliberation substitutions, with or without an express finding of manifest necessity, against double jeopardy attacks. *United States v. Phillips*, 664 F.2d 971, 991-992 & n.14 (5th Cir. 1981), *cert. denied sub nom. Meinster v. United States*, 457 U.S. 1136 (1982); *United States v. Kopituk*, 690 F.2d 1289, 1309 (11th Cir. 1982), *cert. denied sub nom. Turner v. United States,* 461 U.S. 928 (1983). Each of these cases involved unusually complex and lengthy trials. *Phillips*, 664 F.2d at 985-986 & n.4, 996 (record consisting of over 80 volumes in a "most complex and protracted trial"); *Kopituk*, 690 F.2d at 1294, 1308, 1311 (a "massive, complex RICO case" of "truly epic proportions" with trial lasting seven months). Each involved a regular juror who was indisputably unable to proceed with deliberations. *Phillips*, 664 F.2d at 990 (juror suffered heart attack); *Kopituk*, 690 F.2d at 1306 (juror's mental instability was "readily apparent" and promptly confirmed by a psychiatric examination). These factors may well have presented situations of "manifest necessity," but the failure of the courts to analyze the problem in this framework mandates the corrective attention of this Court.

Unlike *Phillips* and *Kopituk*, this case does not even arguably present a case of "manifest necessity." Trial lasted less than three weeks. Although Ms. Koewers reported some difficulty with her

arm, she told the court that she was "probably" well enough to continue, at least after consulting with her doctor. She was, in any event, well enough to bail a friend out of jail and to appear with that friend in the very courthouse in which she was serving as a juror. At a minimum, the trial court should have suspended deliberations for the few hours it would have taken for Ms. Koewers to consult with her doctor. Without some unequivocal indication of "manifest necessity," the trial court should not have reconstituted the jury that had already begun to consider Petitioner's fate. In so doing, the trial court unconstitutionally placed Petitioner in double jeopardy.

II. CONVICTION BY THE RECONSTITUTED JURY VIOLATED PETITIONER'S RIGHT TO A FAIR TRIAL.

The Constitution guarantees Petitioner trial by a fair and impartial jury. U.S. Const. amend. VI, XIV. The trial court's substitution of an alternate juror after deliberations had begun should constitute a *per se* violation of that right. *Cf. United States v. Lamb,* 529 F.2d 1153 (9th Cir. 1975) (en banc) (substitution of alternate juror after deliberations had begun is a *per se* violation of Fed. R. Crim. P. 24 and automatically requires reversal of conviction). But even under a more lenient constitutional test requiring reversal only in particular circumstances, Petitioner is entitled to relief. *Kopituk*, 690 F.2d at 1309 (constitutionality of post-deliberation substitution depends upon the presence of "good cause" for substitution and "adequate safeguards"); *United States v. Hillard*, 701 F.2d 1052, 1057, 1061 (2d Cir.) (no constitutional violation "under the circumstances," but "juror substitution [during deliberations] should be permitted only in complex cases where thorough precautions are taken to ensure that the defendants are not prejudiced"), *cert. denied*, 461 U.S. 958 (1983).

In this case, the circumstances did not justify substitution of an alternate juror after deliberations had commenced. The trial of the case was not particularly complex or protracted. Furthermore, the regular juror summarily dismissed by the trial court on the third day of deliberations was well enough to be present in the courthouse on other business and, accordingly, presumptively well enough to continue with deliberations. Even by her own estimates, she was "probably" able to continue after consulting with her doctor. These circumstances suggest that the real reason Ms. Koewers wanted to leave deliberations was not because of physical inability but because other jurors were pressuring her to reach a verdict with which she was personally unable to agree. This coercive possibility is one key circumstance that should have led the trial court to resist substitution. *See, e.g., Lamb,* 529 F.2d at 1156 ("A lone juror who could not in good conscience vote for conviction could be under great pressure to feign illness or other incapacity so as to place the burden of decision on an alternate juror.").

Moreover, the trial judge in this case failed to employ scrupulously the precautions necessary to protect Petitioner. At the close of proofs, the court discharged alternate jurors and made no effort to limit their exposure to media accounts of the trial. The trial court summarily dismissed a regular juror even though she was by her own assessment probably able to continue after meeting with her doctor, and recalled previously discharged jurors as potential substitutes. Although the court perfunctorily questioned the discharged alternate jurors before selecting one to sit on a new jury, the questioning was not extensive and probing. Moreover, the court did not individually question the regular jurors to assess their ability to begin deliberations anew with Ms. Harrell.

These loose procedures contrast sharply with those necessary to pass constitutional muster in other cases. In *Phillips*, 664 F.2d at 990-991, a regular juror suffered a heart attack during deliberations and was obviously unable to remain with the jury. In anticipation of such a contingency, the trial court had separately sequestered alternate jurors. Before selecting an alternate juror to proceed with deliberations, the court extensively questioned not only the alternate jurors but also the regular jurors to ensure that the defendants would suffer no prejudice. Similarly, in *Kopituk*, 690 F.2d at 1310, the court dismissed a regular juror during deliberations only after first obtaining a psychiatric examination to confirm the presence of mental instability. The court then carefully questioned both regular and alternate jurors to assess the possibility of prejudice to the defendants. Finally, the court confiscated all juror notes and other materials generated during deliberations preceding the substitution.

More importantly, the loose procedures in this case led directly to the reconstitution of a jury with a member who had been contaminated by discussing the case with an assistant Kent County Prosecutor. In response to the trial court's limited questioning, Ms. Harrell had denied discussing the case with anyone. Only by coincidence did the trial court later discover the conversation, but even then the trial court did not suspend deliberations to probe the matter further with Ms. Harrell. Petitioner can only speculate about other undisclosed contacts that may have tainted Ms. Harrell.

What is known about Ms. Harrell's discussion with the assistant prosecutor even more plainly demonstrates the prejudice generated by the trial court's procedure. According to the assistant prosecutor, Ms. Harrell felt that Petitioner was not guilty because the prosecution had simply failed to produce persuasive

evidence. Moreover, Ms. Harrell's feeling was very strong. It is not known what the assistant prosecutor may have said to affect Ms. Harrell's feelings, but what is known is that the new jury ultimately decided to acquit all individual defendants but to convict Petitioner, the corporate defendant, on at least some of the charges. The apparent inconsistency in these verdicts suggests that some jurors may have felt strongly that Petitioner and the other defendants were guilty, that these jurors brought sufficient pressure on Ms. Koewers to trigger her desire to leave deliberations, and that these jurors ultimately persuaded substitute juror Ms. Harrell to compromise her own strong convictions to avoid further prolonging deliberations already extended by Ms. Koewers' departure.

This case and these particular facts provide this Court with an opportunity not only to correct constitutional violations in this particular case, but also to resolve authoritatively an "important issue in the administration of justice." *Hillard*, 701 F.2d at 1056. Some federal circuits have already held that substitution of alternate jurors during deliberations does not automatically violate a defendant's constitutional right to a fair trial, but these circuits have not articulated uniform standards to guide lower courts in distinguishing between constitutional and unconstitutional procedures. Moreover, at least one federal circuit has held that post-submission juror substitution mandates *per se* reversal of any resulting conviction. *Lamb*, 529 F.2d at 1156 & n.7. *But cf. United States v. Rubio*, 727 F.2d 786, 799 & n.7 (9th Cir. 1983) (panel of the Ninth Circuit questioning holding of Ninth Circuit's *en banc* decision in *Lamb*). The technical basis for decision in *Lamb* is Federal Rule of Criminal Procedure 24(c), but the court's discussion suggests that the rule may be constitutionally mandated. *Lamb*, 529 F.2d at 1156. *Cf. Baccari*, 489 F.2d at 275

(substitution of alternate juror during deliberations would have mandated reversal but for valid waiver of constitutional rights).

This Court has, so far, declined to consider the issue on a plenary basis. Petitioner respectfully submits that this case presents an ideal opportunity for this Court to resolve the constitutional questions presented for the proper administration of criminal justice in every state and federal court in the nation.

CONCLUSION

For these reasons, Petitioner asks this Honorable Court to issue a writ of certiorari to the Court of Appeals of the State of Michigan.

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APPENDIX

(Filed February 23, 1989)
Docket No. 98771

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs.

DRY LAND MARINA, INC.,
Defendant-Appellant,

and

JAMES E. GEERLINGS,
HERBERT F. POSTMA, JR.,
RANDY F. POSTMA, and
MARC VANDENBOSCH,
Defendants.

Before: SULLIVAN, P.J., and MACKENZIE and G. SCHNELZ,* JJ.

MACKENZIE, J. Dry Land Marina (hereafter defendant), a retail seller of watercraft, was charged with eight counts of sales tax fraud, MCL 205.27; MSA 7.657(27). Four of defendant's

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* Circuit judge, sitting on the Court of Appeals by assignment.

officers/salesmen were also charged with aiding and abetting tax fraud. Following a jury trial, defendant was convicted on five counts and all of the individual defendants were acquitted. Defendant was sentenced to pay a $5,000 fine on each conviction. Defendant appeals as of right. We affirm.

At issue in this case is the manner in which the trial court resolved a situation which arose when, during jury deliberations, a juror became ill. Trial began on September 15, 1986, with the selection of fourteen jurors. On October 7, 1986, following ten days of testimony, the court instructed the fourteen jurors and then selected two alternates. The twelve jurors subsequently deliberated for approximately one hour.

The jury resumed deliberations the following morning, October 8. The court excused the jury for the day at 2:30 p.m., in part because one of the jurors, who had broken her arm the preceding weekend, told the court she was not feeling well. The ailing juror was instructed to return in the morning or call.

The following morning, October 9, the juror in question failed to appear or contact the court. When the clerk advised that she had seen the juror in the courthouse, she was summoned and questioned. The juror explained that she was at the courthouse to appear in court with a friend whom she had bailed out of jail the previous night. She indicated that she was having circulatory problems in her hand, that her hand was discolored, that she had an appointment to see her doctor that afternoon, that the painkillers she was taking made her groggy, and that there was a possibility she would have to undergo an operation within two to three weeks. The court decided, over defense objection, to permanently excuse the juror and seat one of the alternates.

The court then conducted a voir dire examination of the alternate jurors. Both indicated that they followed the court's instructions as given when they were excused and had not discussed the case with anyone. When both reaffirmed their ability to judge the case fairly, one was selected by lot to replace the ailing juror. The jury was instructed to begin deliberations anew.

That afternoon, the prosecutor trying the case discovered that after the replacement juror had been selected as an alternate she spoke with another prosecutor. On the record the following day, the second prosecutor stated that, although the conversation began on an unrelated topic, the juror expressed her disappointment in being excused and expressed an opinion that the defendants were not guilty. The replacement juror remained impaneled.

The jury reached its verdict on October 13, 1986. As previously noted, the individual defendants were all acquitted. Defendant was acquitted on two counts and convicted on five counts. The court had earlier dismissed the remaining count against defendant.

On appeal, defendant challenges both the trial court's decision to discharge the ailing juror and its decision to seat an alternate after jury deliberations had begun.

We first consider the trial court's decision to discharge the ailing juror. A criminal defendant is placed in jeopardy once the jury is impaneled and sworn. At that point he has a constitutional right to have his case completed and decided by that tribunal. *United States* v *Jorn*, 400 US 470, 479, 484; 91 S Ct 547; 27 L Ed 2d 543 (1971); *People* v *Gardner*, 37 Mich App 520, 526; 195 NW2d 62 (1972), *lv den* 387 Mich 771 (1972). A discharge of the jury, without legal justification or the defendant's consent, before

it has reached final verdict, operates as a dismissal of the charges and bars retrial. *Gardner*, *supra*, p 526.

The discharge of the ailing juror in the present case occurred after the jury had deliberated for approximately four hours. According to defendant, absent a finding of "manifest necessity" by the court to justify excusing the juror, the discharge operated as a dismissal with prejudice of all charges against the defendants.

The trial court's decision to remove a juror will only be reversed when there has been a clear abuse of discretion. *People* v *Van Camp*, 356 Mich 593, 604-605; 97 NW2d 726 (1959); *People* v *Mason*, 96 Mich App 47, 49-50; 292 NW2d 480 (1980). As reiterated by this Court many times, a trial court abuses its discretion when it makes a determination that is so grossly violative of fact and logic that it defies reason and amounts to passion or bias. *Spalding* v *Spalding*, 355 Mich 382, 384; 94 NW2d 810 (1959). We conclude that the decision of the trial court to excuse the ailing juror constituted a proper exercise of judicial discretion supported by fact and logic. The juror had a real or imagined physical disability and was obviously reluctant to cooperate, as evidenced by her failure to appear or call the court that morning. Defendant had a definite fundamental interest in retaining the composition of the jury as originally chosen to finally decide its case. However, defendant's equally fundamental right to have a fair and impartial jury decide its case was protected by removing a juror who was either too ill to serve or unwilling to cooperate.

Furthermore, defendant's contention that a finding of manifest necessity by the trial court is required to discharge the juror misconstrues the intent of that concept. Manifest necessity is a standard enunciated in *United States* v *Perez*, 22 US (9 Wheat) 579; 6 L Ed 165 (1824), which governs a trial court's discretion to declare a mistrial over defendant's objection. Courts are vested

as a matter of law with the authority to discharge a jury from rendering a verdict, when, under all the circumstances, there is a manifest necessity to do so in order to further the ends of public justice. *Id.*, p 580. A classic example of manifest necessity requiring discharge of the jury is a hung jury.

In *United States* v *Jorn*, *supra*, the United States Supreme Court held that, absent defendant's motion for, or consent to, a mistrial, the *Perez* manifest necessity doctrine stands as a command to the trial court not to foreclose the defendant's valued right to have that particular jury decide his case until, in "scrupulous exercise" of judicial discretion, it determines that justice will not be served by continuing the proceedings to conclusion. *Id.* The court must consider viable alternative measures to declaring a mistrial.

In accord with these authorities, the Michigan Supreme Court has also held that the trial court must exercise its power to declare a mistrial with great caution and employ less drastic alternatives which would be revealed by the scrupulous exercise of judicial discretion. *People* v *Benton*, 402 Mich 47, 60-61; 260 NW2d 77 (1977). Before a court declares a mistrial on its own initiative, it should conduct a hearing on the record to thoroughly consider the situation and make explicit findings that no reasonable alterative exists. *Id.*, p 61.

Based on the foregoing, it may be concluded that the policy of protecting defendant's right to have its case decided by the jury as chosen is protected by avoiding a mistrial if reasonable alternatives exist. For the reasons stated below, we think it was reasonable for the court to call back an alternate juror. The fact that other reasonable alternatives existed, and that one or more of these alternatives may have been better than that chosen by

the trial court, does not render its decision an abuse of discretion which requires reversal of defendant's conviction.

The remaining question is whether the court's decision to seat an alternate juror after deliberations began constituted error requiring reversal. We hold that it did not.

MCR 6.102(A) provides:

> Alternate Jurors. The court may direct that 13 or more jurors may be impaneled to sit in a felony case. After the instructions to the jury have been given and the case submitted, the names of the jurors must be placed in a container and names drawn from it to reduce the number of jurors to 12, who shall constitute the jury. The persons eliminated in this manner must be discharged from the case after the jury retires to consider its verdict.

This rule clearly and unambiguously mandates that once alternate jurors are selected they must be discharged from the case and the remaining twelve jurors are the panel that will decide the defendant's case. It is thus clear that the trial court's decision in the present case to remove a juror on account of illness after deliberations had begun was in violation of MCR 6.102(A).

Defendant contends that the error per se requires reversal. We disagree. In reaching this conclusion, we are guided by decisions of several circuits of the United States Court of Appeals considering FR Crim P 24(c), the federal rule after which MCR 6.102(A) was patterned. FR Crim P 24(c) provides:

> The court may direct that not more than 6 jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time

> the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. . . . An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. . . .

The language of FR Crim P 24(c) [and MCR 6.102(A)] is not constitutionally mandated. Therefore, there is no violation of a defendant's right to trial by a fair and impartial jury when an alternate juror is recalled and substituted for a deliberating juror excused by the trial court. *United States* v *Phillips*, 664 F2d 971, 992-993 (CA 5, 1981) *cert den sub nom United States* v *Mainster*, 457 US 1136; 102 S Ct 2965; 73 L Ed 2d 1354 (1982). The most substantial danger of a violation of the rule is that the alternate joining a panel which has engaged in deliberations may be coerced and unduly influenced by those jury members who have already formed an opinion. *Id.*, p 995.

Defendant relies on *United States* v *Lamb*, 529 F2d 1153 (CA 9, 1975), in which a majority of the court held that the FR Crim P 24(c) requirement that alternate jurors be discharged is mandatory. The *Lamb* decision, however, has not been widely followed in subsequent cases for two reasons. First, as many of the later cases point out, the facts in the *Lamb* case involved a particularly egregious violation of the rule. *See, e.g., Phillips, supra*. Second, as the later cases also note, *Lamb* is at odds with other decisions refusing to hold that violations of Rule 24(c) automatically require a new trial. *See, e.g., Phillips, supra*, citing *United States* v *Allison*, 481 F2d 468 (CA 5, 1973), aff'd after remand 487 F2d 339 (CA 5, 1973), cert den 416 US 982; 94 S Ct 2383; 40 L Ed 2d 759 (1974), and *United States* v *Hayutin*, 398 F2d 944 (CA 2, 1968), cert den 393 US 961; 89 S Ct 400; 21 L Ed 2d 374 (1968), subsequent app sub nom *United States* v *Nash*, 414

F2d 234 (CA 2, 1979), cert den 396 US 940; 90 S Ct 375; 24 L Ed 2d 242 (1969).

The prevailing holding among the circuits is that reinstating a discharged alternate juror during deliberations, absent consent of the defendant, requires reversal of a conviction only when the defendant has been prejudiced by the procedure. *See Phillips, supra, United States* v *Kopituk*, 690 F2d 1289 (CA 11, 1982), cert den 463 US 1029; 103 S Ct 3542; 77 L Ed 2d 1391 (1983); *United States* v *Hillard*, 701 F2d 1052 (CA 2, 1983), cert den 461 US 958; 103 S Ct 2431; 77 L Ed 2d 1318 (1983); *Henderson* v *Lane*, 613 F2d 175 (CA 7, 1980), cert den 446 US 986; 100 S Ct 2971; 64 L Ed 2d 844 (1980); *United States* v *Kaminski*, 692 F2d 505 (CA 8, 1982). See generally Anno: *Constitutionality and construction of statute or court rule relating to alternate or additional jurors or substitution of jurors during trial*, 84 ALR2d 1288. *See also People* v *Bettistea*, 173 Mich App 106; 434 NW2d 138 (1988). We believe that this is the better, more reasonable rule.

We find persuasive *United States* v *Hillard, supra*, a case factually analogous to the present case. In *Hillard*, a juror became ill after 2 1/2 days of deliberation and a three-day recess. The two alternate jurors, who had heard all jury instructions, remained at the courthouse separated from the deliberating jurors. The trial judge decided to substitute an alternate juror because a mistrial was a great and unnecessary waste. The judge recalled and interviewed the alternate jurors, who admitted having had general discussions concerning the case, and selected one to sit. The court then instructed the entire jury panel to begin deliberations "from scratch." The *Hillard* court found that the two-day deliberation that followed the substitution procedure and the discriminating verdict returned by the jury support the conclusion that the jury had indeed followed the trial court's instructions that the verdict

must be the product of the thought and mutual deliberation of all twelve jurors.

While there may have been other measures the trial court could have taken under the circumstances of the case, we find no indication that defendant was prejudiced by the trial court's decision to recall the alternate jurors and substitute one of them for a juror excused on account of illness. Many of the factors considered important by the *Hillard* court and other courts which have considered this issue were present in this case. The case involved several counts of tax fraud against several defendants. Over ten full days of testimony was presented to the jury over the course of 2 1/2 weeks. The types of precautions recommended by the courts were taken in this case, and the jurors reaffirmed their ability to fully and fairly consider the case on the evidence as presented and the law as instructed. The fact that the jury retired for another 2 1/2 days to deliberate and returned a verdict that distinguished between several different counts and defendants supports the notion that the jury fully and fairly considered the case. Under these circumstances, reversal is unwarranted.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Joseph B. Sullivan

/s/ Gene Schnelz

(Entered December 19, 1989)

No. 85663

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs.

DRYLAND MARINA, INC., a Michigan corporation,
Defendant-Appellant,

and

JAMES E. GEERLINGS, HERBERT F. POSTMA, JR., RANDY F. POSTMA, and MARC VANDENBOSCH,
Defendants.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Archer, J., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 19, 1989 /s/ Corbin R. Davis, Clerk

(Delivered December 9, 1986)

No. 85-38488-FH

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF KENT

PEOPLE OF THE STATE OF MICHIGAN

vs.

DRY LAND MARINA, INC., a Michigan Corporation, JAMES E. GEERLINGS, HERBERT F. POSTMA, JR., RANDY F. POSTMA and MARC VANDEN BOSCH,
Defendants.

BEFORE THE HONORABLE GEORGE R. COOK, JUDGE

THE COURT: I have read both your excellent briefs. Two of the issues require little deliberation: the motion for a new trial and the motion for a judgment notwithstanding the verdict. They are both denied on the ground that there was sufficient evidence to support that verdict.

The question of the alternate juror is a serious one. When we took the action, we all agreed that there was no Michigan precedent. This Court did what it thought was best. Some Appellate Court may differ.

I feel the defendant corporation had a fair trial, and that is all that is required. It is not entitled to a perfect trial because there is no such animal.

Let me quote briefly from *Williams v Florida*, 399 US 78, 100, 90 Supreme Court 1893, 26 L Ed 2d 446 (1970):

> "It is the interposition between the accused and his accuser of the common-sense judgment of a group of laymen and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."

In *United States v Hillard*, 701 F 2d 1052, CA 21983, the Court said:

> "We think that the essential feature of the jury was preserved in the case now before us. The alternates were chosen along with the regular jurors and by the same procedures. They heard all the evidence and the instructions on the law with the regular jurors. Moreover, the alternate chosen to replace the ill juror reaffirmed his ability to consider the evidence and deliberate fairly and fully, and he indicated that his discussions with the other alternate did not change his view of the case.
>
> "The trial Judge instructed all the jurors to begin their deliberations anew, explaining that a jury verdict must be the product of the deliberations of all 12 people who reach that verdict.
>
> "Thereafter, during the course of its deliberations over a two-day period, the jury made frequent requests for exhibits, testimony and instructions, which suggest that its

verdict was the product of the thought and mutual deliberation of all 12 jurors, including the alternate.

"Moreover, the length of deliberations and the discriminating verdicts reached also support the District Court's conclusion that the defendant suffered no prejudice by the substitution of the alternate.

"Under these circumstances, we find there was no constitutional impediment to the replacement of the ill juror."

Accordingly, the motions are all denied.

I would like to see counsel and the probation agent in chambers.

MR. BRICKER: Thank you, your Honor.

(Proceedings concluded at about 10:08 A.M.)

STATE OF MICHIGAN)
: ss.
COUNTY OF KENT)

OFFICIAL REPORTER'S CERTIFICATE

I, Sandra J. Schumm, Official Court Reporter for the Circuit Court for the County of Kent, State of Michigan, do hereby certify that the foregoing pages comprise a true and correct transcript of the proceedings taken in the matter of THE PEOPLE OF THE STATE OF MICHIGAN vs. DRY LAND MARINA, INC., et al., Case No. 85-38488-FH.

Dated this 22nd day of April, 1987.

/s/ Sandra J. Schumm, CSR-2665
Official Court Reporter